



March 5, 2021

The Honorable Thom Tillis
United States Senate 113
Dirksen Senate Office Building
Washington, DC 20510

Re: Comments on the Discussion Draft of the Digital Copyright Act

Dear Senator Tillis:

The Internet Archive submits this letter in response to the draft copyright legislation released by your office on December 22, 2020 (the “Discussion Draft” or “DCA”).

As you know, the Internet Archive is a 501(c)(3) non-profit library based in San Francisco, California. The Internet Archive works to provide universal access to all knowledge by collecting, archiving, and providing public access to all manner of digital materials. Many of these materials are uploaded by third-party patrons of the Internet Archive: librarians, archivists, enthusiasts, and others. It is only through their work, motivated not by financial gain but by service to the public interest, that much of our digital heritage is archived and preserved today. So the safe harbors of the Digital Millennium Copyright Act—the legal provisions at the heart of this archiving activity—are of crucial importance to us.

We followed your office’s attention to copyright over the years, including last year’s DMCA reform round tables. We submitted a letter responding to your public questions for DMCA stakeholders on December 1, 2020, which is enclosed here for your convenience. We have been heartened by the openness of your process and by the user-focused perspective that has started to emerge as a result.

We were however surprised to see so many new proposals in the Discussion Draft. Having diligently followed last year’s round tables and submitted detailed responses to prior inquiries, there was still much in the Discussion Draft which we had not seen before and which had not been subject of discussion in the round tables. In view of the potentially wide-ranging impact of even small adjustments to the Copyright Act, we believe that much more discussion and analysis is necessary. In that vein, we would very much appreciate an opportunity to speak with your office on a staff-to-staff level to discuss anticipated next steps. More broadly, we look forward to continuing to engage in this process in the years to come.

For this initial letter, we will limit the remainder of our discussion to three of the key issues raised by proposed reforms to Section 512 contained within the Discussion Draft: (I) the negative impact a notice-and-staydown regime would have on the Internet Archive, other libraries, and the digital information ecosystem; (II) the impact of proposed changes to the notification provisions and the very real threat that they could eliminate any meaningful safe-harbor protection; and (III) some of the problems inherent in making safe harbor status contingent on regulatory decrees.

I. Notice and Staydown Will Reduce Access to Knowledge Online

We believe that a notice-and-staydown regime, like the one proposed in the Discussion Draft, would harm the digital information ecosystem and reduce access to knowledge.¹ Such regimes all but require online service providers to develop or purchase access to automated filtering technologies, manually review all material prior to upload, or engage in some combination of the two. This imposes costs on service providers which could make operations difficult or impossible for all but the largest corporate behemoths, substantially limiting access to knowledge online. We worry that non-profit libraries like us will have no place in such a digital ecosystem.

By conditioning participation as an online service provider on access to expensive resources (such as content filtering), notice and staydown may eliminate many smaller and alternative platforms for expression online. This would have deleterious effects not only on the Internet Archive—whose status as an OSP is at the heart of much of its operations—but also on other libraries and non-profits. The result would be an information ecosystem controlled almost entirely by the largest platforms, who—in addition to employing content filtering—would be free to censor or otherwise remove materials according to their own algorithmic priorities.

In an age marked by allegations of censorship and misinformation online, where it is often observed that “the truth is paywalled but the lies are free,” it is more important than ever that a diversity of platforms and voices be allowed to flourish online. And who better to serve the public interest than libraries? Libraries have long been an unbiased source of information for all citizens, without paywalls. In the 21st Century, they must play this role online. In many respects they already do—and not just the Internet Archive.² For example, nearly three-quarters of respondents to a recent nationwide survey indicated positive views of their public library, and since the COVID-19 pandemic,

¹ Indeed, Maria Strong, then-Acting Register of Copyrights, noted on page 14 of her June 29, 2020 letter to your office and that of Senator Leahy that new system would result in “a very different internet ecosystem” with “significant impacts on the operations and business models of both current and future OSPs, and these impacts would likely disproportionately affect smaller OSPs and new start-ups.”

² See <https://www.newamerica.org/education-policy/reports/public-libraries-and-the-pandemic/>.

nearly 40% of them utilize online library resources. In North Carolina alone, fully 48% of users of the State Library of North Carolina say that they prefer to use the library online.³

We believe that for libraries to survive, and thrive, in the digital age, many will need to stand—as we do—as online service providers which rely in part on their patrons to curate digital collections. The current DMCA notice and takedown provisions allow us to do so in a way that responds to the legitimate interests of copyright owners without imposing insurmountable economic barriers to participation as a service provider. Notice and staydown as represented in the Discussion Draft would seriously threaten the ability of libraries like ours to perform our important public interest functions in the digital world.

II. Libraries Need Clear Notice Requirements

Whether as a part of notice-and-staydown or any other system, ambiguous take down notices make things difficult for libraries. Internet Archive works in good faith with those requesting removal to understand their concerns and respond appropriately. But we are concerned that the notice provisions in the Discussion Draft would make this more difficult. In some instances, these provisions seem to ask librarians—already overworked and underfunded—to do a noticer’s work for them. In others, vague notices could have the unfortunate, and presumably unintended, effect of depriving libraries of safe harbor status without providing fair notice of the claim. There are several provisions in the Discussion Draft which appear to present these kinds of problems.

First, the proposed Section 512(b)’s use of the term “non-exhaustive representative list[s]” is concerning. What does it mean for a representative list to be “non-exhaustive”? Is it therefore incomplete? And if so, how is the library to understand the full nature and scope of the complainant’s claim? How much research would be required to get at information readily available to the noticer him or herself? At what point could an agent processing such a claim determine that they are “done” and able to move on to the next one? And what happens if the agent inadvertently misses one or more of the items that the complainant had intended, without clarifying, to be part of the complaint? Making safe harbor status contingent on an unknown quantity of research imposes unnecessary burdens on libraries and is difficult to implement, especially at scale. And it is not necessary, as the noticer is aware of what they own and of the nature of their concern. There is good reason to ask that they state it plainly and clearly in the notice itself.

Second, we are concerned that the Discussion Draft appears to obligate libraries to provide an unknown level of “assist[ance]” to those who submit improper or incomplete notices. Librarians love to help, but again, it is unclear exactly what they are supposed to do with vague or incomplete notices, how much assistance they can or should reasonably be expected to offer, and how a library is supposed to operationalize such an open-ended provision. Like others, Internet Archive already receives many incomplete and vague

³ Final Report: State Library of North Carolina Needs Assessment, *available at* https://files.nc.gov/dncr-statelibrary/state_library_steering_committee_report_final.pdf.

notices, oftentimes the result of automated software programs with nonsensical outputs and we work with those notices as best we can. But librarians should not have to spend their limited time trying to decipher masses of vague automated notices. And we would only expect these kinds of notices to increase where, pursuant to Section 512(b)(2)(B) of the Discussion Draft, they need not even be signed, let alone under penalty of perjury, and can trigger these obligations without providing even basic information about the location of the works in question. We stand willing to work with individuals to try to help resolve their concerns when, for example, they submit notices that do not provide URLs of allegedly infringing works. But we are concerned that the kind of open-ended obligations set out in the Discussion Draft will be impossible to implement in practice.

In short, we believe that notice requirements should be clarified and strengthened and not watered down. Internet Archive already spends substantial time and resources making reasonable good faith efforts to respond to vague notices. Making safe harbor status contingent on even vaguer notices puts librarians in an unfair and unworkable position. We therefore believe that proper notice should continue to contain, at a minimum, a specific identification of the allegedly copyrighted and infringing works and an identifiable location--preferably URL--for the former.

III. Regulating Technical Measures

Finally, we are concerned by the Discussion Draft's proposed delegations of regulatory authority to the Copyright Office on so many broad and potentially highly technical matters. We do not believe these issues are suitable for resolution through a recurrent regulatory rulemaking regime.

Perhaps most concerning is the extent to which Copyright Office decision making would become central to qualification for safe harbor status. The Copyright Office would be responsible for setting standards for (1) user notifications pursuant to Section 512(a)(2)(C)(i)(II), (2) "reasonableness (sic) best practices" pursuant to Section 512(a)(2)(E), (3) mandated and alternative noticing provisions under Section 512(b)(3), (4) protections for personally identifiable information under Section 512(b)(5), and (5) registered agents under Section 512(c). Particularly when combined with Section 512(d), the practical effect of these provisions would be to grant extraordinary authority to the Copyright Office to determine who qualifies for safe harbor status--and to change the rules on an ongoing basis through recurrent regulatory rulemaking. We are worried about the uncertainty this would create, the need for continual engagement with the regulatory process, and the potential need for senseless technological change which could result from subjecting the basic requirements for safe harbor status to continual regulatory debate and change.

More particularly, we worry about the concept of asking the Copyright Office to regulate "standard technical measure," "reasonableness [sic] best practices," and other such technical matters. The Copyright Office (which has no particular expertise in this

area⁴) should not be setting technological standards for the internet. We do not see that copyright policy requires or would benefit from what amounts to a government technology mandate. This type of mandate would have the effect of suppressing competition and innovation at the intersection of the technology and copyright sectors.

Thank you again for the opportunity to participate in this process. We look forward to continuing this conversation and would welcome a phone call with your office to further discuss.

Respectfully yours,

Lila Bailey
Policy Counsel
Internet Archive

⁴ In fact, it has struggled over the years even to keep its own systems up to par. *See, e.g.*, United States Copyright Office, Transforming Document Recordation at the United States Copyright Office (December 2014) at 54 (describing various technical and other difficulties with the Copyright Office’s recordation system, which “has long been subject to criticism” despite decades-old “reenginerring effort[s]”) *available at* <https://www.copyright.gov/docs/recordation/recordation-report.pdf>. To be sure, the Office has been making commendable efforts to correct these longstanding deficiencies, which no doubt have many causes.